

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ITV DIRECT, INC.

Plaintiff,

V.

HEALTHY SOLUTIONS, L.L.C., et al.,

Defendants.

CAPPSEALS, INC.

Plaintiff-in-Intervention,

V.

HEALTHY SOLUTIONS, L.L.C., d/b/a
DIRECT BUSINESS CONCEPTS; ITV
DIRECT, INC.; and DIRECT
FULFILLMENT, LLC,

Intervenor-Defendants.

AND RELATED CASES

**PRETRIAL CONFERENCE MEMORANDUM OF
DEFENDANTS HEALTHY SOLUTIONS, LLC, HEALTH SOLUTIONS, INC. and
ALEJANDRO GUERRERO, MICHAEL HOWELL, GREGORY GEREMESZ**

I. INTRODUCTION

A. Length of Trial -10 Days without Proposed Settlement. The issues described below are disputed if the Proposed Settlement is not approved by the Court.

B. Length of Trial with Proposed Settlement-1 Day. With the Proposed Settlement, Plaintiff in Intervention Cappseals' claims against Plaintiffs ITV Direct, Inc. and Direct Fulfillment Inc. remain to be tried. Cappseals claims against Defendant Healthy Solutions LLC –Healthy Solutions LLC stipulates to entry of judgment against it on its First , Second, Fourth, and Fifth Causes of Action, Breach of Contract, Account Stated, and Action on Account in accord with the Offer of Judgment filed concurrently.

C. Settlement. The Healthy Solutions Parties (Healthy Solutions LLC, Health Solutions Inc., Alejandro Guerrero, Michael Howell and Greg Geremesz) and ITV Direct and Direct Fulfillment have settled their claims. The settlement, however, requires the approval of this Court and Judge O'Toole because of stipulated preliminary injunctions previously entered into in this case and in the case of *FTC v. Direct Marketing Concepts*.

D. Pending Motions: Motion for Court Approval of Settlement

II. SUMMARY OF EVIDENCE AND ISSUES

Plaintiff ITV Direct is a television advertisement producer. Defendants are the owners of the mark "SUPREME GREENS" (Health Solutions, Inc.), the owner of the trade secret formula nutritional supplement marketed under the "SUPREME GREENS" mark (Alejandro "Alex" Guerrero), and the marketing company for "SUPREME GREENS" (Healthy Solutions LLC).

In April 2004, Plaintiff ITV Direct, Inc. and Defendant Healthy Solutions LLC entered into a written and fully executed Distribution Agreement for the marketing of Supreme Greens via television infomercials. Plaintiff ITV Direct became Defendants' distributor, promoter and licensee of Supreme Greens. Plaintiff acknowledged in this written contract that "SUPREME GREENS" is not its mark. The contract states: "Manufacturer [Healthy Solutions] produces and sells a vegetable/grass/algae food supplement known as "Supreme Greens with MSM" (the "Product") as formulated. The contract also allowed Plaintiff to use Defendant Guerrero as its spokesperson. At

first, the parties performed under the Agreement, but it was not long until Plaintiff committed a series of material breaches and repudiations of the contract. It stopped paying for the Product beginning with December 2003 invoice. Defendants are now owed \$1,821,864 for 303,446 bottles of Supreme Greens for which Plaintiff has not paid a dime.

A. PLAINTIFF HAS BREACHED ITS CONTRACT WITH HEALTHY SOLUTIONS LLC.

First, Plaintiff breached by its failure to pay over \$1.8 million pursuant to the terms of the Agreement, causing the termination of all licenses and rendering further use of the mark infringing. *Burger King Corp. v. Mason*, 710 F.2d 1480, 1492-93 (11th Cir. 1983).

Secondly, Plaintiff repudiated the contract in claiming ownership of the mark and filing suit against the Defendants. Filing suit against a franchisor, in and of itself, is a repudiation of the contract. See *Costandi v. AAMCO Automatic Transmissions, Inc.*, 456 F. 2d 941, 941-943 (9th Cir. 1972).

Plaintiff has wrongfully claimed ownership of the mark, going so far as to send cease and desist letters to Defendants' distributor.

Plaintiff ITV Direct tried to negotiate the purchase of the mark "SUPREME GREENS" in late 2003 and again in February 2004, but when that failed, Plaintiff refused to pay the \$1,821,864 owed.

B. PLAINTIFF HAS INFRINGED DEFENDANTS' TRADEMARK AND VIOLATED DEFENDANT GUERRERO'S RIGHT TO PUBLICITY

In spite of being on notice that the mark belongs to Defendants, in spite of Defendants' demands for payment, and in spite of Defendants' objection to Plaintiff's airing of the infomercials featuring Defendant Guerrero, Plaintiff has continued to wrongfully promote and infringe SUPREME GREENS mark and to use and infringe Guerrero's image, name and voice.

In addition, the exact content of genuine "SUPREME GREENS" is a trade secret. Plaintiff is wrongfully producing a non-genuine product falsely bearing the SUPREME GREENS mark. This will cause irreparable harm in that it is a potential threat to the public safety and health and a

threat to the genuine "SUPREME GREENS" and a threat to Defendants' reputation.

Plaintiff ITV Direct's unauthorized use of the mark "SUPREME GREENS" on non-genuine goods is also federal unfair competition as an infringement of an unregistered mark and as a false designation of origin under the Lanham Act §43(1), 15 U.S.C. 1125(a) which is likely to cause confusion in the market. In addition, such use is common law unfair competition. As a matter of law, Defendants clearly own the mark "Supreme Greens" as its first user, the source of genuine and proprietary Product, the holder of all distribution, manufacturing and promotional rights, and the entity responsible for quality control. The parties Distribution Agreement of April 2003, explicitly cites Defendants as owners of the mark and explicitly retains distribution rights for marketing channels other than infomercials to Defendants. *Bell v. Streetwise Records, Ltd.*, 640 F. Supp. 575, 580 (Dist. Mass. 1983), *citing In re Polar Music International AB*, 714 F.2d 1567 (Fed.Cir.1983); *generally* J. Thomas McCarthy, 2 *McCarthy on Trademarks and Unfair Competition* §16.03 (3d ed.1996).

There is also no question that the mark and Product are associated with "SUPREME GREENS" and Defendant Guerrero as the source and origin of the Product. That Plaintiff ITV Direct is a distributor with strong sales is legally irrelevant. *Bell v. Streetwise Records, Ltd.*, 640 F. Supp. 575, 581 (D. Mass. 1986). Plaintiff ITV Direct's production of a product called "Supreme Greens" is clearly mark infringement. Infringement is shown and injunctive relief is appropriate if the Defendants show that: (1) they own the mark, 2) have a valid, protectable trademark in the name "SUPREME GREENS," (3) the Plaintiff's use of the mark creates a likelihood of confusion. *Bell v. Streetwise Records, Ltd.*, 640 F. Supp. at 579.

Plaintiff claims that it received an assignment of the mark "Supreme Greens. No such agreement is contained in the written Distribution Agreement. While Defendants absolutely deny that they agreed the mark would belong to ITV Direct, it is required by law that trademark assignments for marks under application for federal registration like "SUPREME GREENS", unlike licenses, must be in writing. 11 U.S.C. § 1060. Therefore, Plaintiff cannot have an effective assignment.

In addition, all authority or right of Plaintiff to use the image, voice or likeness of Defendant Guerrero ceased upon its breach of its written agreement with Defendant Healthy Solutions LLC, upon its repudiation of the written agreement by filing this action and falsely claiming ownership of the mark, and/or the expiration of the agreement. Their persistent use of Defendant's Guerrero is a clear violation of Defendant Guerrero's publicity rights. 15 U.S.C. 1125(a); M.G.L. ch.214, § 1B; In addition, it is a clear violation of M.G.L. ch. 214, §3A which protects against unauthorized commercial use of one's image. *See Tropiano v. Atlantic Monthly* (1980) 379 Mass. 745, 750-751.

C. DAMAGES

Each of these claims independently entitle Defendants to damages of at least \$1.8 million dollars and a Permanent Injunction barring the Plaintiffs for further use of the Supreme Greens Mark and Alex Guerrero's likeness. Lanham Act, 15 U.S.C. § 1116, the common law and Rule 65 of the Federal Rules of Civil Procedure; *See Societe des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 640 (1st Cir. 1992) ("[i]rreparable harm flows from an unlawful trademark infringement as a matter of law.").

Plaintiff-in-Intervention, Cappseals Inc., is one of Defendants' suppliers. Cappseals is owed over \$892,000 for Supreme Greens supplied to ITV Direct and Direct Fulfillment.

III. EXHIBITS

Trial Exhibit No.	Description	Date Identified	Date Admitted
1	Master of Science Degree (A. Guerrero Depo. Exh. 1)		
2	Health Solutions Document (A. Guerrero Depo. Exh. 2) (ITV0004-ITV0005)		
3	Alternative Health Documents, Dated 4/2/04 (A. Guerrero Depo. Exh. 3) (SH-125-SH-131)		
4	E-Mail , 9/10/03, Mike to Jason Bernabei (A. Guerrero Depo. Exh. 4) (ITV00237-ITV00238)		

5	Product Licensing and Marketing Agreement (A. Guerrero Depo. Exh. 5) (SH-296-SH297)		
6	Distribution Agreement (A. Guerrero Depo. Exh. 6) (ITV00239-ITV00251)		
7	Transcript of 4/11/03 Show 2 Supreme Greens with MSM (A. Guerrero Depo. Exh. 7) (ITV00259-ITV287)		
8	Transcript of Dr. Guerrero Sales Seminar (A. Guerrero Depo. Exh. 8) (1-42)		
9	Note, Alex Guerrero to Donald Barrett (A. Guerrero Depo. Exh. 9) (ITV00094)		
10	Series of e-Mails between Donald Barrett and Alex Guerrero Re: Documentation Folder (A. Guerrero Depo. Exh. 10) (ITV00507)		
11	Official Transcript Proceeding FTC Recorded: 8/23/03 Transcribed: 9/30/03 (Exh. 11)		
12	Fax, 1/9/04, Eileen Barrett to Alex Guerrero (A. Guerrero Depo. Exh. 12) (SH-220-SH221)		
13	Copy of e-mail to Gregory Geremesz from Eileen Barrett re: Supreme Greens Website (Exh. 13) (ITV 00176)		
14	E-mail- 3/10/04, Eileen Barrett to Donald Barrett Transcript of Dr.Guerrero's voicemail (A. Guerrero Depo. Exh. 14) (ITV00211-ITV00216)		
15	E-mail, 3/16/04, Jason Bernabei to Eileen Barrett with copy of letter (A. Guerrero Depo. Exh. 15) (ITV00215-ITV00216)		
16	E-mail, 4/30/04, J. Bernabei to Eileen Barrett with attachment on Supreme Greens (A. Guerrero Depo. Exh. 16) (ITV00222-ITV00223)		

17	Web Pages www.supreme-greens.net (Mr. Howell Depo. Exh. 17) (SH-155-SH-157)		
18	4-21-04 letter from Seyfarth Shaw (G.Geremesz Depo. Exh. 18)		
19	Letter from Levin & O'Connor Dated 4-29-04 To Mr. Robertson from Becky Christensen (G.Geremesz Depo. Exh.19)		
20	Barrett e-mails re: Call with FTC – Supreme Greens with MSM (G.Geremesz Depo. Exh. 20) (ITV00120)		
21	Warner e-mails re: Supreme Green Info (G.Geremesz Depo. Exh. 21) (ITV00038-ITV00041)		
22	Warner e-mails re: Supreme Greens Info (G.Geremesz Depo. Exh. 22) (ITV00042-ITV00043)		
23	Copy of series of e-mails between Christopher Brown and Eileen Barrett re: Supreme Greens' domain name (G.Geremesz Depo. Exh. 23) (ITV00153)		
24	Copy of e-mail to Eileen Barrett from Christopher Brown and to Christopher Brown from Eileen Barrett re: Supreme Greens' domain name (G.Geremesz Depo. Exh. 24) (ITV00158)		
25	Copy of e-mail to Gregory Geremesz from Christopher Brown re: Supreme Greens' website (G.Geremesz Depo. Exh. 25) (ITV00177)		
26	Copy of e-mail to Gregory Geremesz from Christopher Brown re: Supreme Greens (G.Geremesz Depo. Exh. 26) (ITV00178)		
27	Copy of series of e-mails to Gregory Geremesz from Christopher Brown re: (G.Geremesz Depo. Exh. 27) (ITV00192, ITV00206-ITV00210)		

28	Copy of e-mail to Mr. Geremesz and Mr. Guerrero from Eileen Barrett re: FDA Investigation (G.Geremesz Depo. Exh. 28) (ITV00173)		
29	Copy of e-mail to Mr. Geremesz , Mr. Guerrero and Mr. Howell from Eileen Barrett re: FDA Investigation (G.Geremesz Depo. Exh. 29) (ITV00214)		
30	Copy of e-mails from Mike Howell to Becky Christensen re : FDA Letter (G.Geremesz Depo. Exh. 30) (SH-227-SH-230)		
31	Label Supreme Greens with MSM (J.Bernabei Depo.Exh. 31)		
32	Articles on health (J.Bernabei Depo.Exh. 32) (ITV447-ITV507)		
33	Answer and Cross complaint of Direct Marketing Concepts (D. Barrett Depo. Exh. 33)		
34	Affidavit of Donald Barrett (D. Barrett Depo. Exh. 34)		
35	Direct Marketing Concepts Expense by Vendor Detail (D. Barrett Depo. Exh. 35) (ITV00288-ITV00290, ITV00395)		
36	Fax and transcript of final version done 9/10/03 to Direct Marketing Concepts from Peter S. Brooks re: FTC Investigation (D. Barrett Depo. Exh. 36) (SH-094-SH-109)		
37	Declaration of Robert Maihos in Opposition to Plaintiff's Motion for Temporary Restraining Order (R. Maihos Depo. Exh. 37)		
100	E-mail, 2/16/04 Eileen Barrett to Greg Geremensez re: Supreme Green Website (A. Guerrero Depo. Exh 13) (ITV00176)		
101	Series of Invoices Reference # H1004, H2007, H2008, H2021, and H2023		

102	Notice to Cease and Desist to Mr. Michael A. Angle from Metaxas Norman & Pidgeon, LLP		
103	Email from Scott Stanwood to Alex Guerrero re: Settlement Agreement		
104	Distribution Agreement		
105	Declaration of Landon King M.D. in Support of Plaintiff's Motion for Temporary Restraining Order		
106	Declaration of Barrie Cassileth, Ph.D in Support of Plaintiff's Motion for Temporary Restraining Order		
107	Declaration of Scott Sarver in Support of Plaintiff's Motion for Temporary Restraining Order		
108	Declaration of Richard Cushman in Support of Plaintiff's Motion for Temporary Restraining Order		
109	Declaration of Scott Stanwood in Support of Plaintiff's Motion for Temporary Restraining Order		
110	Declaration of Kial Young in Support of Plaintiff's Motion for Temporary Restraining Order		

IV. WITNESSES

Pursuant to Federal Rules of Civil Procedure 26(a)(3) and District of Massachusetts Local Rule 16.5, Defendant Health Solutions, LLC hereby identifies the following individuals as persons who may testify at the trial in this case:

A.M. Marketing, LLC
(978) 825-9380
Chris Georgiades

Arizona Nutritional Supplements
380 East Chilton Drive
Chandler, Arizona 85225
Troy Linton

Cappseals, Inc.
12607 NE 95TH ST #A-100
Vancouver, WA 98682
Harry N. Anderson
Donald Webb

Counter Productions Video

Ted Reed
Cummings Center, Suite 143H
Beverly, MA 01915

Direct Fulfillment, LLC

100 Cummings Center, Suite 143H
Beverly, MA 01915

Direct Marketing Concepts, Inc. dba Today's Health dba Direct Fulfillment

20 Oakpoint Ext.
Saugus, MA 01906

Greg Geremesz

c/o O'Connor Christensen & McLaughlin LLP
1920 Main Street, Suite 150
Irvine, CA 92614
(949) 851-5000

GMP Laboratories of Ameirca, Inc.

2931 East La Jolla Street
Anaheim, CA 92806
(714) 630-2467
Aisha Kaka

Alejandro Guerrero

c/o O'Connor Christensen & McLaughlin LLP
1920 Main Street, Suite 150
Irvine, CA 92614
(949) 851-5000

Health Solutions, Inc.

c/o O'Connor Christensen & McLaughlin LLP
1920 Main Street, Suite 150
Irvine, CA 92614
(949) 851-5000

Healthy Solutions, L.L.C.

c/o O'Connor Christensen & McLaughlin LLP
1920 Main Street, Suite 150
Irvine, CA 92614
(949) 851-5000

Michael Howell
c/o O'Connor Christensen & McLaughlin LLP
1920 Main Street, Suite 150
Irvine, CA 92614
(949) 851-5000

Ideal Health
Todd Stanwood
Scott Stanwood
17250 Dallas Parkway
Dallas, TX 75248
(800) 768-7667

Infomercial Monitoring Service, Inc.
812 Parkway Boulevard, Satellite 2
Broomall, PA 19008
Sam Cantanese, President

ITV Direct, Inc. - Current and Former Employees
900 Cummings Center, Suite 506E
Beverly, MA 01915
Donald Barrett
Jason Bernabei
Linda Beliveau
Wayne Callahan
Paul Gaffney
John Maihos
Robert Maihos
Brian Mittendorf
Eric Sklar

Scott Sarver
16 Meetinghouse Sq.
Danvers, MA 01923
(978) 420-8434

William Tarmey
16 Willow St.
Beverly, MA 01915
(617) 918-3679

Mercury Global, Inc.
520 Broadway, Suite 400
Santa Monica, CA 90401
(310) 451-2900
Jeffrey Mandell
Mayra Perez

MXM Essentials, Inc.
Becky Brainard
9543 S. 213th Street
Kent, WA 98031
(253) 872-2005

Nutramarketing
Tyler Echols
2735 S. Cole Road
Boise, ID 83709
(208) 860-5891

Any witness identified by Plaintiff ITV Direct, Inc.

Respectfully submitted,

By: /s/ Becky V. Christensen, Esq.
Becky V. Christensen, Esq. (State Bar No. 147013)
1920 Main Street, Suite 150
Irvine, California 92614
Telephone #: (949) 851-5000
Facsimile #: (949) 851-5051

Dustin F. Hecker, Esq.
POSTERNAK BLANKSTEIN & LUND LLP
Prudential Tower
800 Boylston Street
Boston, Massachusetts 02199-8004
Telephone #: (617) 973-6100
Facsimile #: (617) 367-2315

Attorneys for DEFENDANTS
HEALTHY SOLUTIONS, LLC,
HEALTH SOLUTIONS, INC.
and ALEJANDRO GUERRERO, MICHAEL HOWELL,
GREGORY GEREMESZ

Dated: March 30, 2005

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2005, a copy of foregoing PRETRIAL CONFERENCE MEMORANDUM OF DEFENDANTS HEALTHY SOLUTIONS, LLC, HEALTH SOLUTIONS, INC. and ALEJANDRO GUERRERO, MICHAEL HOWELL, GREGORY GEREMESZ was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Christopher F. Robertson, Esq.
Peter S. Brooks, Esq.
Susan W. Gelwick, Esq.
SEYFARTH SHAW LLP
Two Seaport Lane, Suite 300
Boston, MA 02210
(617) 946-4800
(617) 946-4801 Fax
pbrooks@seyfarth.com
kperrelli@seyfarth.com

Attorneys for Plaintiff
ITV DIRECT, INC.

Christopher C. Larkin, Esq.
SEYFARTH SHAW LLP
2029 Century Park E., Suite 3300
Los Angeles, CA 90067-3063
(310) 277-7200

Attorneys for Consolidated Defendant
ITV DIRECT, INC.

Daniel J. Kelly, Esq.
Scott A. Silverman, Esq.
Kristin Cataldo, Esq.
GADSBY HANNAH LLP
225 Franklin Street
Boston, MA 02110
617 345-7000
617 345-7050 Fax
dkelly@ghlaw.com
cpriolo@ghlaw.com

Attorneys for Plaintiff-in-Intervention
CAPPSEALS, INC.

/s/ Becky V. Christensen
Becky V. Christensen, Esq.
Counsel for Healthy Solutions LLC, Health
Solutions Inc., Alejandro Guerrero, Michael
Howell, and Gregory Geremesz